IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2526 OF 2007

ACC Ltd. ...Petitioners

V/s.

Associated Cement Staff Union & Ors....Respondents

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Mr.J.P.Cama, Sr.Counsel with Mr.Sohrab Parekh i/b M/s.Haresh Mehta & Co. for Petitioners.

Mr.P.M.Patel for Respondent No.1.

Mr.R.S.Pai i/b Mr.Nethra Kargutkar for Respondent No.3.

Mr.Neel Helekar for Respondent No.4.

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CORAM: A.M.KHANWILKAR, J.

DECEMBER 4, 2007.

P.C.

1. Heard Counsel for the parties. Perused the relevant documents brought to my notice by the Counsel appearing for the respective parties.

2. This Petition takes exception to the order passed by the Industrial Court, Mumbai dated 24th September 2007 below Exhibit C-8 in Complaint (ULP)

No.1055 of 1956. By the said application, the lower Court was called upon to dismiss the complaint on the argument that the said Court had no jurisdiction to examine the complaint as filed by the Union. The lower Court has rejected the said application while holding that the issue as to whether there existed relationship of employer and employee between the parties, can be considered after giving opportunity to the Complainant to establish that position on the basis of documents to be filed by them. The Court has went on to prima facie observe that the plea of the Complainant was supported by documents with list at 'Exhibit U-5'. One of the circumstance was of deduction of ESIC Contribution of the employees.

3. According to the Petitioner-Employer, the said Court had no jurisdiction because the relationship of Petitioner and the employees - of 'employer and employee' - was neither indisputable nor undisputed. For, according to the Petitioner, the employees were not directly employed by the Petitioner. In fact, the Union's own case, contends Counsel for the Petitioner, as can be

discerned from the complaint, is that the concerned employees; about 24 in numbers, referred to in the complaint, were employed for the activities of the Petitioner but rooted through the Contractor which is sham and bogus. According to the Petitioner, such a plea clearly spells out the position that the relationship between the parties is neither indisputable nor undisputed and for which reason, the matter is squarely covered by the decision of the Division Bench of our High Court in the case of **Hindustan Coca Cola Bottling S/W Pvt.Ltd. vs. Bhartiya Kamgar Sena & Ors. reported in 2001 III CLR 1025**.

4. Reliance is also placed on the decision of the Single Judge of our High Court in the case of **Omkar Sitaram Rane vs. Maharashtra State Khadi and Village Industries Board, Bombay & Ors. reported in 2003 I CLR 560**, which according to the Petitioner deals with similar situation. My attention is also invited by the Counsel for the Petitioner to the decision in **Akhil Bhartiya Shramik Kamgar Union vs. Buildtech Constructions & Ors. reported in 2004 II CLR 179** to contend that

the said case is not an authority on the point in issue that arises for consideration.

5. Counsel for the Petitioner submits that the lower Court having recorded only prima facie opinion, it necessarily follows that no authoritative finding on the issue whether there exists relationship of employer and employee between the parties which was indisputable or undisputed has been recorded; and in absence of such a finding, the Court cannot assume jurisdiction to itself to permit parties to lead evidence on the preliminary issue whether such relationship existed between them. It was also argued that mere deduction of ESIC contribution does not create relationship of employer-employee. For, such deduction was on account of statutory obligation and not conceding the status of employee of such person.

6. Per contra, Counsel for the Respondents relying on the documents (particularly at pages 129 to 141) issued by the Petitioner Company in the form of salary vouchers and bonus in respect of

some of the employees would contend that at least to the extent of such employees, there was scope to examine the matter. It is argued that it was obvious that at least in respect of such employees, the employer has recognised the relationship of employer and employee, in which case, the complaint cannot be dismissed in toto - but the Court will have to proceed with the matter to examine whether such a relationship existed in respect of some of the employees which relationship is indisputable and/or undisputed. It is also argued that even deduction of ESIC contribution of some of the employees is a strong circumstance indicative of recognition of relationship of employer-employee.

7. Having considered the rival submissions, I have no hesitation in taking the view that the final conclusion reached by the Industrial Court in the impugned order of rejecting the application preferred on behalf of the Petitioner is appropriate. For, the lower Court was fully conscious of the legal requirements. However, it prima facie felt that there were certain documents and circumstances to support the plea of the Union

that at least to the extent of some employees the relationship of employer-employee would be indisputable or in the realm of such relationship having been recognised by the Petitioners in the past. Those aspects were required to be considered at appropriate stage, rather in the first instance. I find no infirmity in this approach of the lower Court.

8. Indeed, the Court will have to decide the matter in the context of the settled legal position. In the first place, the Industrial Court will have to address itself to the issue whether relationship between the parties of employer and employee was recognised at any point of time and has been now disputed by the employer. That obviously is an issue which will have to be considered by the Industrial Court. That principle has been recognised even by the Division Bench of our High Court in the case of Hindustan Coca Cola Bottling S/W Pvt.Ltd. v. Bhartiya Kamgar Sena & Ors. in Para 16, which reads thus:

"We are in agreement with the observations

> of the learned Single Judge but with a rider that in cases where the employer-employee relationship was recognised at some stage and thereafter it was disputed, the Industrial Court has jurisdiction to decide this issue as an incidental issue under section 32 of the MRTU & PULP Act." (emphasis supplied)

9. In my opinion, that issue will have to be addressed by the Industrial Court in the first instance. Merely because it is observed by the Industrial Court that the parties may lead evidence on preliminary issue whether there existed employer-employee relationship between the Petitioner herein and the employees referred to at Annexure 'A', that would not by itself, be sufficient to overturn the final conclusion reached by the Court below. That observation will have to be considered in the context of the scope of enquiry to be undertaken by the Court in the first instance.

10. It is once again clarified that the complaint will have to proceed keeping in mind the exposition of the Division Bench in the case of **Hindustan Coca Cola Bottling S/W Pvt.Ltd. (supra)** as also the observations in the case of **Akhil**

Bhartiya Shramik Kamgar Union (supra). It is open to the lower Court to undertake limited enquiry to examine whether the denial referred to in the written statement is frivolous, vexatious or malafide, being contrary to the record of the employer, which record has been pressed into service on behalf of the employees at least in relation to employees at Serial Nos.8, 10, 11, 12, 14 to 19. In other words the Industrial Court will have to decipher the pleadings and materials in respect of such employees, whose relationship was recognised by the Petitioners in the past but has now been disputed. In the event, the Industrial Court were to find that from the materials on record, the relationship of parties at least in respect of some of the employees was that of employer and employee recognised by the Petitioners in the past, at least to that extent, the complaint would proceed further. That is a matter which will have to be tried at the first instance. Indeed, if there is no material to support the plea of some of the employees that the Petitioners had recognised them as its employees in the past, the Industrial Court would be slow in examining the matter any

further qua them. For, it will have no jurisdiction to adjudicate the points in issue between them.

11. With the above clarification, it is not necessary to dwell upon any other issue raised before this Court which will affect the claim of

the parties one way or the other. All questions in that behalf are left open. The Industrial Court will consider all relevant aspects on its own merits in accordance with law as aforesaid keeping in mind the exposition of the decisions which are pressed into service on behalf of the Petitioners.

12. Petition disposed of with the above observations.

A.M.KHANWILKAR, J.